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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 753

SUZANNE THOMAS RICHARDS, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA and
AMERICAN AIRLINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This case presents an important question under the Federal Tort Claims Act with respect to the choice of law for determining the liability of the United States in cases where the government's negligence occurred in one state and the injury in another. Section 1346(b) of Title 28 U.S.C. provides that the government's liability for the negligence of its employees shall be determined "in accordance with the law of the place where the act or omission occurred." The instant case involves claims for wrongful death growing out of an airplane crash in Missouri allegedly caused

by the negligence of the United States in Oklahoma in failing to require adequate maintenance of the airplane there. The Court of Appeals for the Tenth Circuit held that Oklahoma was "the place where the act or omission occurred" but that "the law" of such place includes the conflict of laws rule of that state; and that since Oklahoma, in determining the measure of liability for wrongful death occurring outside the state, would look to the law of the state where the death occurred (Missouri in this case), 28 U.S.C. 1346(b) requires the application of the $15,000 limit imposed by Missouri law in wrongful death cases. In so holding, the court recognized (Pet. 34) that its position was contrary to that of the Ninth Circuit in *United States* v. *Marshall*, 230 F. 2d 183.

In view of (1) the direct conflict between the decision below and *Marshall*, (2) the conflicting views among the other circuits that have considered the question and (3) the growing importance of the issue in the administration of the Federal Tort Claims Act, we agree with petitioners that it is appropriate for this Court to decide the question. Accordingly, we do not oppose the petition for a writ of certiorari.

1. In *United States* v. *Marshall*, *supra*, a fire and explosion occurred on a railroad in Idaho as a result of a negligent act or omission that took place in Utah. The court held (230 F. 2d at 187) that the phrase "the law of the place where the act or omission occurred" in the Tort Claims Act "means the place where the negligence, either of act or omission, became operative, directly causing the injury and not places where the negligence existed but was then inoperative. Therefore, Idaho law would determine whether liability

exists as to the United States." The court in the *Marshall* case thus looked to the law of the place where the injury occurred, not the place where the negligence or omission took place, to determine the liability of the United States.[1]

In *Eastern Air Lines* v. *Union Trust Co.*, 221 F. 2d 62 (C.A. D.C.), certiorari denied *sub nom. Union Trust Co.* v. *United States*, 350 U.S. 911, however, the Court of Appeals for the District of Columbia Circuit applied the law of the place where the negligent act occurred in determining the government's liability. That case involved an airplane crash in the District of Columbia that resulted from negligence found to have occurred in Virginia. District of Columbia law imposed no limit on recovery for wrongful death, but Virginia limited recovery to $15,000. The district court, applying District of Columbia law, entered a judgment against the United States for $150,000. The court of appeals held that since Section 1346(b) requires "the Government's liability to be measured under the law of the place where its negligent employee's

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[1] The court also stated (230 F. 2d at 187) that although the negligent act occurred in Utah, "the negligent condition created, continued into Idaho where the explosion occurred. The omission to use care occurred in Idaho as well as Utah."

In *Hess* v. *United States*, 259 F. 2d 285, 290, the Ninth Circuit, in a dictum, reiterated its view that the law of the place of injury rather than the place where the negligence occurred determines the liability of the United States. This Court, however, in reversing that case on other grounds (*Hess* v. *United States*, 361 U.S. 314, 318, n. 7) stated:

> This case does not involve the question that would be presented if wrongful conduct occurring within the territory of one political entity caused injury or death within a different political entity. Cf. *Eastern Air Lines* v. *Union Trust Co.*, 95 U.S. App. D.C. 189, 221 F. 2d 62.

act or omission occured," it "requires Virginia law to be applied in this case" (221 F. 2d at 80); and the court reduced the judgment to $15,000 "to meet the limitation imposed by the law of Virginia on the amount of recovery" (p. 81). The court of appeals did not discuss the problem presented in the instant case, namely, whether Virginia law, in determining liability for wrongful death occurring in another state, would have applied the measure of recovery permitted by such state. Judge Miller dissented on the choice of law issue. His view was that the phrase "in accordance with the law of the place where the act or omission occurred" "was intended to mean, and therefore should be construed as meaning, 'in accordance with the law of the place where the tort occurred.' An act, in legal as well as in popular use, is not merely a voluntary muscular contraction, but something more. The word commonly includes the consequences of the muscular contraction" (221 F. 2d at 80).

In *Voytas* v. *United States*, 256 F. 2d 786, the Court of Appeals for the Seventh Circuit similarly looked to to the law of the place where the negligent act occurred. The case involved an action for damages arising out of the theft of explosives by a soldier from his station at Fort Belvoir, Virginia, and the detonation of those explosives after the soldier gave them to a seventeen-year-old boy in Illinois. The court held that Illinois law controls as to any liability predicated upon the soldier's acts in Illinois, but that Virginia law would have to be looked to for a determination as to whether liability could be predicated upon the acts and omissions charged to the government at Fort Belvoir. *Id.* at 788, 789-90.

In *Landon* v. *United States*, 197 F. 2d 128, the Second Circuit applied the entire body of substantive law of the place where the negligent act occurred, including the conflict of laws rule. The question was whether damages for injury resulting from the government's negligence in New York should include medical expenses and wages for time lost where those items were paid not by the injured party but by his employer. The court concluded that the applicable law was that of New York, "the place where the negligent act occurred." 197 F. 2d 131. The court further held that since New York, in deciding this question, would follow the substantive law of New Jersey (the place of performance of the employment contract), the rule of the latter state should be applied in assessing damages under the Tort Claims Act. Judge Frank, dissenting, refused to follow the court in applying New York conflict-of-laws principles to refer to the substantive law of a place other than that in which the negligent act or omission occurred. He stated that "the Federal Tort Claims Act requires us, in matters affecting substantially the outcome of the litigation, to apply the New York decisional rule * * *." 197 F. 2d at 132.

In the instant case, the court below, citing the *Eastern Air Lines* and *Voytas* cases, *supra*, ruled that "in a case in which the act or omission occurs at one place and resulting death at another [the act] equate[s] the liability of the Government with that of a private litigant under the substantive law of the state where the act or omission of the employee of the Government occurred" (Pet. 34). The court went on, however, to hold that, as "a transitory action for wrongful death occurring in another state may be maintained in the

courts of Oklahoma if the substantive law of such other state creates a right of action for wrongful death and provides for a transitory action for damages as the remedy" (Pet. App. 35), it would apply the substantive tort law of Missouri to determine the liability of the United States.

Chief Judge Murrah, dissenting, stated (Pet. 37-38) that "[t]he effect of this process of reasoning is to apply the substantive law of the place of death rather than the law of the place of the negligent act. The end result seems contrary to our agreed interpretation of the Tort Claims Act. Indeed, under this theory, these suits might have been instituted and maintained in any forum which authorizes them, with liability governed by the law of the place where death occurred, *i.e.*, Missouri. Thus, if the suits had been commenced in Missouri, the Missouri court would have looked to the law of Oklahoma as the place where the negligent act occurred, and the Oklahoma conflicts rule would apply the law of Missouri as the place where death occurred.

"* * * [I]t is my view that the Tort Claims Act provides its own conflicts rule, that is, the law of the place of the negligent act. In other words, we rest upon the law of that state and look no further. * * *"

Thus, the five circuits that have dealt with the choice of law problem in multi-state torts under the Tort Claims Act apply three different rules. The District of Columbia and the Seventh Circuits, Judge Frank of the Second Circuit, and Chief Judge Murrah of the Tenth Circuit would apply the substantive tort law of the "place where the act or omission occurred."

The Second and Tenth Circuits apply the *entire* "law of the place where the act or omission occurred," including its conflicts principles, even though that would result in measuring liability by the law of another state. The Ninth Circuit and Chief Judge Miller of the District of Columbia Circuit would apply the law of the place where the injury, *i.e.*, the tort, occurred, rather than the law of the place of negligence. Moreover, the Ninth Circuit suggested that, through a theory of continuing negligence, the terms of the statute might be reconciled with traditional concepts of conflict of laws. We believe that resolution by this Court of these divergent viewpoints is called for at this time.

2. Contrary to the statement of respondent American Airlines (Br. in Opp. 4-6), we believe that the question is an important one. In addition to the cases cited above, the problem arose in *Krusilla* v. *United States*, C.A. 2, No. 26240, decided February 16, 1961 (liability for a death in New Jersey as the result of medical malpractice in New York) and *Matland* v. *United States*, 285 F. 2d 752 (C.A. 3) (effect of a release executed in Pennsylvania and concerning an airplane crash in Arizona allegedly caused by negligence in California and Utah). The question is also likely to arise in many of the pending cases now before various district courts that involve injuries in one state resulting from alleged negligence in another.[2] Furthermore,

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[2] See, for example, *Allen* v. *United States*, D. Ariz., Civ. 568—Pret.; *Harms* v. *United States*, D. Ariz., Civ. 566-Pret.; *Kemnitz* v. *United States*, D. Ariz., Civ. 567-Pret.; *Wilde* v. *United States*, D. Ariz., Civ. 569-Pret.; *Miller* v. *United States*, D. Del., Civ. 2207; *United Air Lines* v. *United States*, D. Del., Civ. 2043; *Breyfogle* v. *United States*, D.D.C. Civ. 2132-57; *Capital Airlines* v. *United*

other provisions of the Tort Claims Act also refer to "the law of the place where the act or omission occurred." See 28 U.S.C. 2672 (administrative settlements); 28 U.S.C. 2674 (punitive damages).

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

APRIL 1961.

States, D.D.C. Civ. 1238-59; *Dotzenroth* v. *United States*, D.D.C. Civ. 3-61; *Levin* v. *United States*, D.D.C. Civ. 1554-57; *Maryland for use of Brady* v. *United States*, D.D.C. Civ. 1237-59; *Maryland for use of Meyer* v. *United States*, D.D.C. Civ. 1236-59; *Randall* v. *United States*, D.D.C. Civ. 4688-50; *Capital Airlines* v. *United States*, D. Md. Civ. 11370; *Maryland for use of Brady* v. *United States*, D. Md. Civ. 11369; *Maryland for use of Dickson* v. *Capital Airlines*, D. Md. Civ. 11386; *Maryland for use of Gliedman* v. *Capital Airlines*, D. Md. Civ. 11385; *Maryland for use of Hunt* v. *United States*, D. Md., Civ. 11376; *Maryland for use of Levin* v. *Capital Airlines*, D. Md. Civ. 11384; *Maryland for use of Meyer* v. *United States*, D. Md. Civ. 11368; *Ten* v. *United States*, D. Md. Civ. 11393; *Hazelwood* v. *United States*, D.N.J. Civ. 702-50; *Ray* v. *United States*, D.N.J. Civ. 701-50; *Clothier* v. *United States*, E.D.N.Y. Civ. 61C-189; *Maryland for use of Morgan* v. *Capital Airlines*, E.D.N.Y. Civ. 19207; *Burten* v. *United States*, S.D.N.Y. 61 Civ. 492; *St. Clair* v. *United States*, S.D.N.Y. Civ. 61-269; *Wood* v. *United States*, S.D.N.Y. 60 Civ. 122; *Maryland for use of Dickson* v. *Capital Airlines*, S.D. Ohio Civ. 5548; *Maryland for use of Johns* v. *Capital Airlines*, W.D. Pa. Civ. 17541; *Maryland for use of Levin* v. *Capital Airlines*, W.D. Pa. Civ. 17503.

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